

HOUSE No. 739

By Mr. O’Flaherty of Chelsea, petition of Eugene L. O’Flaherty relative to the elective share of spouses in the probating of certain estates. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand and Five.

AN ACT IMPROVING THE SPOUSAL ELECTIVE SHARE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Definitions. When used in this chapter the
2 following words or terms shall have, unless the context clearly
3 indicates otherwise, the following meanings:

4 (a) “Beneficiary”, a beneficiary of the decedent’s probate estate
5 or of a trust holding property included in the elective estate,
6 including a nominee or realty trust.

7 (b) “Decedent’s nonprobate” transfers to others the types of
8 transfers specifically included in the elective estate under para-
9 graphs (c)(2) and (3) of this section.

10 (c) “Elective estate”, all property, whether real or personal,
11 movable or immovable, tangible or intangible, wherever situated,
12 that constitutes the decedent’s net probate estate, the decedent’s
13 nonprobate transfers to others, and the decedent’s nonprobate
14 transfers to the surviving spouse, reduced by all property excluded
15 from the elective estate, determined as follows:

16 (1) the decedent’s net probate estate is the decedent’s probate
17 estate reduced by funeral and administration expenses, homestead
18 allowance, family allowances, exempt property, and enforceable
19 claims.

20 (2) the decedent’s nonprobate transfers to others include any of
21 the following types to persons or entities other than the surviving
22 spouse, in the amount provided respectively for each type of
23 transfer:

24 (i) property owned or owned in substance by the decedent
25 immediately before death that passed outside probate at the dece-
26 dent's death, including

27 (A) property over which the decedent alone, immediately
28 before death, held a presently exercisable general power of
29 appointment. The amount included is the value of the property
30 subject to the power, to the extent the property passed at the dece-
31 dent's death, by exercise, release, lapse, in default, or otherwise,
32 to or for the benefit of any person other than the decedent's estate
33 or surviving spouse.

34 (B) the decedent's fractional interest in property held by the
35 decedent in joint tenancy with the right of survivorship. The
36 amount included is the value of the decedent's fractional interest,
37 to the extent the fractional interest passed by right of survivorship
38 at the decedent's death to a surviving joint tenant other than the
39 decedent's surviving spouse.

40 (C) the decedent's ownership interest in property or accounts
41 held in pay-on-death form, transfer-on-death form, or coowner-
42 ship registration with the right of survivorship. The amount
43 included is the value of the decedent's ownership interest, to the
44 extent the decedent's ownership interest passed at the decedent's
45 death to or for the benefit of any person other than the decedent's
46 estate or surviving spouse.

47 (D) insurance on the decedent's life as to which the decedent,
48 either alone or in conjunction with any other person, owned any of
49 the economic benefits of the policy, including the power to change
50 the beneficiary, to surrender or cancel the policy, to assign the
51 policy, to revoke an assignment, to pledge the policy for a loan, or
52 to obtain from the insurer a loan against the surrender value of the
53 policy, or owned a reversionary interest in the policy or its pro-
54 ceeds, whether arising by the express terms of the policy or other
55 instrument or by operation of law, but only if the value of the
56 reversionary interest immediately before the death of the decedent
57 exceeded five percent of the value of the policy. The amount
58 included is the value of the proceeds, to the extent they were
59 payable at the decedent's death to or for the benefit of any person
60 other than the decedent's estate or surviving spouse.

61 (ii) property transferred in any of the following forms by the
62 decedent during marriage:

63 (A) any irrevocable transfer in which the decedent retained the
64 right to the possession or enjoyment of, or to the income from, the
65 property if and to the extent the decedent's right terminated at or
66 continued beyond the decedent's death. The amount included is
67 the value of the fraction of the property to which the decedent's
68 right related, to the extent the fraction of the property passed out-
69 side probate to or for the benefit of any person other than the
70 decedent's estate or surviving spouse.

71 (B) any transfer in which the decedent created a power over
72 income or property, exercisable by the decedent alone or in con-
73 junction with any other person, or exercisable by a nonadverse
74 party, to or for the benefit of the decedent, creditors of the dece-
75 dent, the decedent's estate, or creditors of the decedent's estate.
76 The amount included with respect to a power over property is the
77 value of the property subject to the power, and the amount
78 included with respect to a power over income is the value of the
79 property that produces or produced the income, to the extent the
80 power in either case was exercisable at the decedent's death to or
81 for the benefit of any person other than the decedent's surviving
82 spouse or to the extent the property passed at the decedent's death,
83 by exercise, release, lapse, in default, or otherwise, to or for the
84 benefit of any person other than the decedent's estate or surviving
85 spouse. If the power is a power over both income and property
86 and the preceding sentence produces different amounts, the
87 amount included is the greater amount.

88 (iii) property that passed during marriage and during the one
89 year period next preceding the decedent's death as a result of a
90 transfer by the decedent for less than full and adequate considera-
91 tion if the transfer was of any of the following types:

92 (A) any property that passed as a result of the termination of a
93 right or interest in, or power over, property that would have been
94 included in the elective estate under paragraph (2) (i) (A), (B), or
95 (C), or under paragraph (2) (ii), of this section 1(c) if the right,
96 interest, or power had not terminated until the decedent's death.
97 The amount included is the value of the property that would have
98 been included under those paragraphs if the property were valued
99 at the time the right, interest, or power terminated, and is included
100 only to the extent the property passed upon termination to or for
101 the benefit of any person other than the decedent or the decedent's

102 estate, spouse, or surviving spouse. As used in this subparagraph
103 “termination”, with respect to a right or interest in property,
104 occurs when the right or interest terminated by the terms of the
105 governing instrument or the decedent transferred or relinquished
106 the right or interest, and, with respect to a power over property,
107 occurs when the power terminated by exercise, release, lapse,
108 default, or otherwise, but, with respect to a power described in
109 paragraph (2) (i) (A), “termination” occurs when the power termi-
110 nated by exercise or release, but not otherwise.

111 (B) any transfer of or relating to an insurance policy on the life
112 of the decedent if the proceeds would have been included in the
113 elective estate under paragraph (2) (i) (D) of this section 1(c) had
114 the transfer not occurred. The amount included is the value of the
115 insurance proceeds to the extent the proceeds were payable at the
116 decedent’s death to or for the benefit of any person other than the
117 decedent’s estate or surviving spouse.

118 (C) any transfer of property, to the extent not otherwise
119 included in the elective estate, made to or for the benefit of a
120 person other than the decedent’s surviving spouse. The amount
121 included is the value of the transferred property to the extent the
122 aggregate transfers to any one done in any calendar year falling
123 within the one year period exceeded \$10,000.

124 (3) the decedent’s nonprobate transfers to the surviving spouse
125 consist of all property that passed outside probate from the dece-
126 dent to the surviving spouse at the decedent’s death or by reason
127 of the decedent’s death, excluding property passing to the sur-
128 viving spouse under the federal social security system. The dece-
129 dent’s nonprobate transfers to the surviving spouse include any of
130 the following types of transfers, in the amount provided respec-
131 tively for each type of transfer:

132 (i) the decedent’s fractional interest in property held as a joint
133 tenant with the right of survivorship, to the extent that the dece-
134 dent’s fractional interest passed to the surviving spouse as sur-
135 viving joint tenant;

136 (ii) the decedent’s ownership interest in property or accounts
137 held in co-ownership registration with the right of survivorship, to
138 the extent the decedent’s ownership interest passed to the sur-
139 viving spouse as surviving co-owner; and

140 (iii) all other property that would have been included in the
141 elective estate under paragraphs (2) (i) or (ii) of this section 1(c)
142 had it passed to or for the benefit of a person other than the sur-
143 viving spouse, the decedent, or the decedent's creditors, estate, or
144 estate creditors.

145 (4) the value of property included in the elective estate is
146 reduced in each category by enforceable claims against the
147 included property.

148 (5) in case of overlapping application to the same property of
149 the paragraphs or subparagraphs of this section including property
150 in the elective estate, the property is included in the elective estate
151 under the provision yielding the greatest value, and under only
152 one overlapping provision if they all yield the same value.

153 (6) the following types of property are excluded from the elec-
154 tive estate:

155 (i) any of the decedent's nonprobate transfers to others to the
156 extent the decedent received adequate and full consideration in
157 money or money's worth for the transfer.

158 (ii) any property (or any interest in property) as to which the
159 surviving spouse has relinquished his or her right of election pur-
160 suant to a written instrument complying with the provisions of
161 section 10 of this chapter.

162 (iii) interests in community property arising under the commu-
163 nity property laws of other states.

164 (iv) any interest in the decedent's principal residence when
165 such interest was conveyed by the decedent to or for the benefit of
166 any one or more of the issue of the surviving spouse at a time
167 when the surviving spouse was incapacitated as defined in section
168 3 of this chapter.

169 (v) any property held in trust for the benefit of a disabled child
170 or grandchild of the surviving spouse.

171 (vi) the decedent's nonprobate transfers to others as defined in
172 paragraph (2) of this section I (c) that were irrevocable before the
173 enactment date of this chapter.

174 (7) for purposes of this chapter, all property included in the
175 elective estate shall be valued at its fair market value as of the
176 date of the decedent's death, except that property included in the
177 elective state under paragraph (2) (iii) (cc) of this section 1(c)
178 shall be valued at its fair market value as of the date of the
179 transfer.

180 (d) “fractional interest in property held in joint tenancy with the
181 right of survivorship” whether the fractional interest is unilaterally
182 severable or not, the fraction, the numerator of which is one and
183 the denominator of which, if the decedent was a joint tenant, is
184 one plus the number of joint tenants who survive the decedent and
185 which, if the decedent was not a joint tenant, is the number of
186 joint tenants.

187 (e) “fraudulent transfer”, any payment of money, assignment,
188 release, transfer, mortgage or pledge of, or the creation of a lien or
189 encumbrance upon, an asset included in the elective estate that is
190 fraudulent under chapter 109A as to the surviving spouse as a
191 creditor by virtue of this chapter. For purposes of determining
192 whether the person making the transfer or entering into the obliga-
193 tion is or will be thereby rendered insolvent, the transfer shall be
194 deemed to have been made or the obligation shall be deemed to
195 have been entered into at the time such person’s debt to the sur-
196 viving spouse is determined by the court under section 7 of this
197 chapter.

198 (f) “governing instrument”, a deed; a will; a trust; an insurance
199 or annuity policy; a pension, profit-sharing, retirement, or similar
200 benefit plan; a contract governing a certificate of deposit or
201 checking, savings, mutual fund, money market, brokerage, cus-
202 tody, agency, or any other financial or depository account; or a
203 security registered with a designated recipient to take upon the
204 death of the owner.

205 (g) “marriage” with respect to a transfer by the decedent during
206 marriage, any marriage of the decedent to the decedent’s surviving
207 spouse.

208 (h) “nonadverse party” a person who does not have a substan-
209 tial beneficial interest in the trust or other property arrangement
210 that would be adversely affected by the exercise or nonexercise of
211 the power that he or she possesses respecting the trust or other
212 property arrangement. A person having a general power of
213 appointment over property is deemed to have a beneficial interest
214 in the property.

215 (i) “original recipient”, a person or entity other than a payor
216 that has received or has the right to receive property included in
217 the elective estate:

218 (1) from the decedent by lifetime transfer;

219 (2) as a personal representative or trustee, including a trustee of
220 a nominee or realty trust; or

221 (3) from a payor or by operation of law by reason of the dece-
222 dent's death.

223 (j) "payor", an insurer, business entity, employer, government,
224 governmental agency or subdivision, or any other person oblig-
225 ated by law or a governing instrument to make payments,
226 excluding a personal representative or a trustee of property
227 included in the elective estate.

228 (k) "personal representative", the executor, administrator,
229 administrator with the will annexed, special administrator, tempo-
230 rary executor, temporary administrator with the will annexed, or
231 administrator de bonis non of the decedent's estate in Massachu-
232 setts, or if none, any person in actual or constructive possession of
233 any property included in the elective estate.

234 (l) "power" or "power of appointment", includes a power to
235 designate the beneficiary of a beneficiary designation.

236 (m) "presently exercisable general power of appointment", a
237 power of appointment under which, at the time in question, the
238 decedent, whether or not he or she then had the capacity to exer-
239 cise the power, held a power to create a present or future interest
240 in himself or herself, his or her creditors, his or her estate, or cred-
241 itors of his or her estate, including a power to revoke or invade the
242 principal of a trust or other property arrangement.

243 (n) "probate estate", property that would pass by intestate suc-
244 cession if the decedent dies without a valid will.

245 (o) "property", includes values subject to a beneficiary designa-
246 tion.

247 (p) "right to income", includes a right to payments under a
248 commercial or private annuity, an annuity trust, a unitrust, or a
249 similar arrangement.

250 (q) "surviving spouse", a person who was married to the dece-
251 dent at the time of the decedent's death.

252 (r) "third party", a person or entity other than the decedent and
253 the surviving spouse.

254 (s) "transfer", as it relates to a transfer by or of the decedent,
255 includes (1) an exercise or release of a presently exercisable
256 general power of appointment held by the decedent, (2) a lapse at
257 death of a presently exercisable general power of appointment

(d) The surviving spouse's homestead allowance, exempt property, and family allowance, if any, shall not be charged against but shall be in addition to the elective share amount, except when an election under paragraph (c) of this section has been made.

36 (e) No federal or state estate, inheritance, generation skipping,
37 or other taxes arising as a result of the decedent's death shall be
38 allocated to or chargeable against the elective share amount.

1 SECTION 3. Election Personal to Surviving Husband or Wife.

2 (a) Surviving husband or wife must be living at time of election.
3 The election provided by this chapter is personal to the surviving
4 husband or wife, may not be reached by creditors or sold,
5 assigned, or transferred in any manner, other than a relinquish-
6 ment as provided in section 2 of this chapter, and may only be
7 made during the lifetime of the surviving husband or wife. In the
8 case of an incapacitated surviving spouse or a surviving spouse
9 under conservatorship, the election may be made only by the duly
10 appointed conservator or guardian of the surviving spouse based
11 upon a substituted judgment standard.

12 No surviving husband or wife, or the conservator or guardian of
13 said surviving husband or wife shall be compelled to make an
14 election under this chapter nor penalized, disadvantaged, or dis-
15 criminated against by virtue of the relinquishment of or failure to
16 make an election under this chapter. Relinquishment of election
17 or failure to make an election shall not affect the eligibility of the
18 surviving husband or wife for benefits or assistance under any
19 governmental program.

20 (b) Incapacitated or Institutionalized Surviving Spouse. If the
21 election is exercised by or on behalf of a surviving spouse who is
22 incapacitated or institutionalized, determined as of the date of the
23 election, that portion of the elective share amounts due under this
24 chapter must be placed in a custodial trust for the benefit of the
25 surviving husband or wife under the provisions of chapter 203B,
26 except as modified below. For purposes of the custodial trust
27 established by this subsection, (i) the electing guardian or conser-
28 vator is the custodial trustee, provided however that if this elec-
29 tion is being made by an institutionalized surviving spouse who is
30 not incapacitated, the duly appointed fiduciary of the deceased
31 spouse's estate shall be the custodial trustee (or such other suit-
32 able trustee as may be appointed by the probate court) (ii) the sur-
33 viving spouse is the beneficiary, and (iii) the custodial trust is
34 deemed to be a trust created by the will of the decedent spouse.

35 (c) Custodial Trust. For the purposes of subsection (b) of this
36 section chapter 203B shall be applied as if section 6 (b) thereof
37 were repealed and sections 2 (e), 9 (b), and 17 (a) were amended
38 to read as follows:

39 (1) Neither an incapacitated nor institutionalized beneficiary
40 nor anyone acting on behalf of an incapacitated or institutional-
41 ized beneficiary has a power to terminate the custodial trust; but if
42 the beneficiary regains capacity and is not institutionalized, the
43 beneficiary then acquires the power to terminate the custodial
44 trust by delivering to the custodial trustee a writing signed by the
45 beneficiary declaring the termination. If not previously termi-
46 nated, the custodial trust terminates on the death of the benefi-
47 ciary.

48 (2) If the beneficiary is incapacitated or institutionalized, the
49 custodial trustee shall expend so much or all of the custodial trust
50 property as the custodial trustee considers advisable for the use
51 and benefit of the beneficiary and individuals who were supported
52 by the beneficiary when the beneficiary became incapacitated or
53 institutionalized, or who are legally entitled to support by the ben-
54 eficiary. Expenditures may be made in the manner, when and to
55 the extent that the custodial trustee determines suitable and
56 proper, without court order but with regard to other support,
57 income, and property of the beneficiary and benefits of medical or
58 other forms of assistance from any state or federal government or
59 governmental agency for which the beneficiary must qualify on
60 the basis of need.

61 (3) Upon the beneficiary's death, the custodial trustee shall
62 transfer the unexpended custodial trust property in the following
63 order: (i) to or as directed by the person who would have taken
64 under the disposition originally made by the beneficiary's prede-
65 ceased spouse against whom the elective share was taken or (ii)
66 under the residuary clause, if any, of the will of the beneficiary's
67 predeceased spouse against whom the elective share was taken, as
68 if that predeceased spouse died immediately after the beneficiary;
69 or (iii) to that predeceased spouse's heirs.

70 As used in this section, the term "incapacitated" shall mean
71 lacking sufficient soundness of mind to (i) understand correctly
72 the nature and situation of the individual's property, properly care
73 for such property, and make informed decisions regarding such

74 property, (ii) understand the nature of the act the individual is
75 committing when the individual enters into or terminates a legal
76 relationship with another person, and (iii) think and act on the
77 individual's own behalf as to matters concerning the individual's
78 personal health, safety, and general welfare. An individual having
79 a duly appointed guardian shall be presumed to be incapacitated.

80 As used in this section, the term "institutionalized" shall mean
81 being an inpatient in a nursing facility, being an inpatient in a
82 medical institution and receiving the level of care that would be
83 provided in a nursing facility, being an inpatient in an interme-
84 diate care facility for the mentally retarded, or requiring the level
85 of care that would be provided in a hospital, nursing facility, or
86 intermediate care facility for the mentally retarded but for the pro-
87 vision of home or community-based services.

88 Any dispute regarding whether a surviving spouse is incapaci-
89 tated or institutionalized as defined in this section shall be
90 resolved by the probate court.

1 SECTION 4. Partial Election. A surviving spouse may elect
2 less than all of his or her elective share amount. To make a partial
3 election, the surviving spouse shall indicate on his or her petition
4 for an elective share that he or she is making a partial election and
5 the percentage of the elective share amount elected.

1 SECTION 5. Notice to Surviving Spouse. (a) On or before the
2 day the personal representative of the decedent's estate files his or
3 her petition for appointment, the personal representative shall
4 send by certified mail or delivery to the decedent's surviving
5 spouse at his or her current address, or if the current address of the
6 surviving spouse is not known to the surviving spouse's last
7 known address, a written notice that the surviving spouse may
8 have a right to elect a share of the decedent's estate under
9 chapter 191C and that the surviving spouse has a right to retain a
10 lawyer to represent him or her in connection with electing under
11 this chapter. The notice shall further inform the surviving spouse
12 of his or her right to written disclosure of a description of the
13 assets and the estimated values of the assets included in the dece-
14 dent's elective estate as provided in section 6 of this chapter, and
15 shall inform the surviving spouse of the date by which the sur-
16 viving spouse must elect as provided in section 7 of this chapter.

17 (b) The personal representative shall attach to such notice a
18 copy of chapter 191C. Every petition for probate of a decedent's
19 will or for administration of a decedent's estate indicating that the
20 decedent left a surviving spouse shall include a sworn statement
21 that the notice to the surviving spouse required by this section has
22 been sent by certified mail or delivery. Any personal representa-
23 tive of the decedent's estate may give such notice at any time
24 prior to commencement of a probate proceeding, if any.

1 SECTION 6. Disclosure to Surviving Spouse. (a) No later than
2 one month after the surviving spouse's written request for disclo-
3 sure from the personal representative, the personal representative
4 shall, by certified mail or delivery, provide to the surviving spouse
5 the following written information:

- 6 (i) a list of the assets and interests included in the elective
7 estate, with each asset or interest identified with particularity;
8 (ii) an estimate of the fair market value of each listed asset, as
9 of the valuation date set forth in section 1; and
10 (iii) the information relied upon in making each estimate.

11 (b) No later than one month after the surviving spouse's written
12 request for disclosure from a person or entity holding property
13 included in the elective estate, the person or entity holding such
14 property shall, by certified mail or delivery, provide to the sur-
15 viving spouse the following written information:

- 16 (i) a list of the assets and interests included in the elective
17 estate and held by that person or entity, with each asset or interest
18 identified with particularity;
19 (ii) an estimate of the fair market value of each listed asset, as
20 of the valuation date set forth in section 1; and
21 (iii) the information relied upon in making the estimate.

22 (c) If a federal estate tax return or any state estate or inheritance
23 tax returns are required under the applicable tax laws, then upon
24 written request of the surviving spouse the personal representative
25 shall provide to the surviving spouse copies of all such tax returns
26 within one month after filing such returns with the Internal Rev-
27 enue Service or state taxing authority.

28 (d) In every case where a petition for an elective share has been
29 timely filed, the personal representative shall provide in writing to
30 the surviving spouse the information normally required by a fed-

31 eral estate tax return regarding the assets and the values of the
32 assets included in the decedent's estate, by the later of (1) the due
33 date for filing the federal estate tax return as extended, if an estate
34 tax return is required to be filed, or (ii) three months after the
35 filing of the petition for the elective share.

36 (e) In the event that any person or entity shall fail to comply
37 with the provisions of this section six within the time specified,
38 that person or entity shall be liable to the surviving spouse for the
39 costs and fees reasonably incurred by the surviving spouse to
40 secure such compliance, unless the court finds that the delay or
41 noncompliance was due to excusable neglect.

1 SECTION 7. Proceeding for Elective Share; Time Limit.

2 (a) The election shall be made by filing a petition for the elective
3 share in the court having jurisdiction of the probate proceedings
4 relating to the decedent's estate, or if no proceedings have been
5 commenced, in the court having jurisdiction of probate proceed-
6 ings in the county where the decedent was last domiciled, not later
7 than the expiration of the earlier of

8 (1) six months after the surviving spouse receives notice in
9 accordance with section 5 or (ii) one year after the decedent's date
10 of death. A copy of the petition for the elective share shall be
11 mailed or delivered to the personal representative (if any) at the
12 time the petition is filed.

13 (b) After notice and hearing, the court shall determine the elec-
14 tive share amount and shall enter judgment ordering its payment
15 as appears appropriate under section 9. In such judgment, the
16 court shall fix the liability of each person or entity required to
17 make contribution toward satisfaction of the elective share amount
18 under section 9.

19 (c) A judgment of the probate court entered under this chapter
20 shall be enforceable in other courts of this state or in other Juris-
21 dictions.

22 (d) A surviving spouse may withdraw or amend the petition for
23 an elective share at any time before entry of a final determination
24 by the court.

25 (e) If the supreme judicial court, upon a complaint filed by a
26 surviving spouse whose petition for the elective share shall not
27 have been filed within the time limit prescribed in subpart (a) of

28 this section 7, deems that justice and equity require it and that
29 such surviving spouse is not chargeable with culpable neglect in
30 not filing said petition within the prescribed time limits, it may
31 determine the elective share amount and enter judgment ordering
32 its payment as appears appropriate under section 9; provided,
33 however, forthwith upon the filing of said complaint a notice
34 thereof (in the nature of a lis pendens) shall have been filed in the
35 registry of probate where probate proceedings are pending, or, if
36 none, where the decedent was domiciled at the date of death, pro-
37 vided further that such judgment shall not affect any payment or
38 distribution made before the filing of such complaint and notice.

1 SECTION 8. Effect of Election. (a) If the right of election is
2 exercised by or on behalf of the surviving spouse, the surviving
3 spouse's homestead allowance under chapter 188 right to occupy
4 the decedent's house under section 1 of chapter 196, and
5 allowance for necessities under section 2 of chapter 196, if any,
6 are not charged against but are in addition to the elective share
7 amount.

8 (b) After the right of election has been exercised by or on
9 behalf of the surviving spouse and the elective share amount has
10 been satisfied, all property or interests in property remaining in
11 the elective estate shall pass to the decedent's beneficiaries other
12 than the Surviving spouse, as if the surviving spouse had prede-
13 ceased the decedent.

1 SECTION 9. Satisfying Elective Share Amount. (a) Unless the
2 decedent provides otherwise by will, or unless otherwise provided
3 in section 12 below, or unless the probate court orders otherwise
4 as justice and equity may require, in a proceeding for an elective
5 share, property or interests in property included in the elective
6 estate shall be applied to satisfy the elective share amount in the
7 following order:

8 (1) outright transfers to surviving spouse.

9 (i) property or interests in property which were transferred out-
10 right to the surviving spouse by the decedent within one year of
11 the decedent's death valued as of the date of transfer;

12 (ii) property or interests in property which pass or have passed
13 outright to the surviving spouse by testate or intestate succession,

14 or which would have so passed to the surviving spouse but for the
15 filing of the petition for an elective share by or on behalf of the
16 surviving spouse;

17 (iii) property or interests in property which pass or have passed
18 outright to the surviving spouse otherwise than by testate or intes-
19 tate succession but by reason of the decedent's death, including
20 the decedent's interest in joint property in which the surviving
21 spouse held a right of survivorship, or which would have so
22 passed to the surviving spouse but for the filing of the petition for
23 an elective share by or on behalf of the surviving spouse;

24 (iv) property or interests in property which would have passed
25 outright to the surviving spouse by reason of the decedent's death
26 but were disclaimed.

27 (2) trusts for surviving spouse. If after the application of sub-
28 section (1) the elective share amount is not fully satisfied, prop-
29 erty or interests in property included in the elective estate which
30 pass or have passed in trust to the surviving spouse, or which
31 would have so passed to the surviving spouse but for the filing of
32 the petition for an elective share by or on behalf of the surviving
33 spouse, shall be applied to satisfy the elective share amount in the
34 following order:

35 (i) trusts of which the decedent was a donor and (1) the assets
36 of which may be reached by the surviving spouse acting alone
37 through the exercise of a power of appointment either during life
38 or by will, or (ii) the assets of which are to be paid to the sur-
39 viving spouse's estate;

40 (ii) trusts of which the decedent was a donor and the surviving
41 spouse is named as the sole beneficiary during the surviving
42 spouse's lifetime.

43 For purposes of this subsection (2), the term "trust" shall
44 include any interest in property measured by a period of time,
45 including, for example, a life

46 (3) other transfers by decedent. If after the application of sub-
47 sections (1) and (2) the elective share amount is not fully satis-
48 fied, property or interests in property included in the elective
49 estate, but not including any gifts made within one year of death,
50 shall be applied to satisfy the elective share amount in the
51 following order:

52 (i) trusts of which the decedent was a donor and which have
53 more than one beneficiary including the surviving spouse during
54 the surviving spouse's lifetime;

55 (ii) property or interests in property which pass or have passed
56 to beneficiaries or recipients other than the surviving spouse out-
57 right by testate or intestate succession or otherwise by reason of
58 the decedent's death, including the decedent's interest in joint
59 property with right of survivorship, or in any trust of which the
60 decedent is or was a donor and of which the surviving spouse is
61 not a beneficiary.

62 (4) power of appointment property. If after the application of
63 subsections (1), (2) and (3) the elective share amount is not fully
64 satisfied, amounts included in the elective estate as defined in
65 section 1 (c) of this chapter because the decedent possessed one or
66 more powers of appointment shall be applied to satisfy the elec-
67 tive share amount. Said powers of appointment shall be deemed
68 exercised to the extent necessary to give effect to this subsection.

69 (5) gifts made within one year of death. If after the application
70 of subsections (1), (2), (3) and (4) the elective share amount is not
71 fully satisfied, amounts included in the elective estate which have
72 passed to recipients other than the surviving spouse because of
73 any gifts made within one year of death shall be applied to satisfy
74 the elective share amount.

75 (i) pro-rata apportionment; valuation. If the elective share
76 amount will be fully satisfied by application of less than all assets
77 within any one category set out in the foregoing subsection (a), a
78 portion of each asset within the category shall be allocated in sat-
79 isfaction of the elective share amount to be determined by a frac-
80 tion, the numerator of which is the value of the asset and the
81 denominator of which is the value of all assets within the cate-
82 gory. The amount so allocated shall not be apportioned between
83 temporary and remainder estates.

84 Assets distributed in kind shall be valued at the date of distribu-
85 tion, which date shall be set by agreement of the interested parties
86 or, in the absence of such agreement, by order of the probate
87 court.

88 (ii) interest. Each payment of cash in satisfaction of the elec-
89 tive share amount shall bear interest from the date of the dece-

90 dent's death, at the rate provided for pecuniary legacies under
91 section 20 of chapter 197 as it may be from time to time amended,
92 or any successor section. Each distribution in kind in satisfaction
93 of the elective share amount shall carry with it the right of the sur-
94 viving spouse to receive from the distributing party all income (if
95 any) attributable to the distributed asset or assets between the date
96 of valuation set forth in section 1 and the date of

97 (iii) liability of original recipients and beneficiaries. An orig-
98 inal recipient or a beneficiary other than the surviving spouse is
99 liable to make contribution toward satisfaction of the elective
100 share amount in accordance with the provisions of the foregoing
101 subsections (a) through (c) inclusive. A person liable to make con-
102 tribution may choose to give up such property (or a proportional
103 part thereof, as the case may be) or to pay the value of the amount
104 for which the person is liable. No original recipient who shall con-
105 form to the standard of a Massachusetts executor or administrator
106 with respect to the care and management of assets included in the
107 elective estate, or who shall hold all such assets in the form in
108 which such original recipient received them, shall be liable to the
109 surviving spouse in an amount greater than the sum of (1) the
110 value of the elective estate assets received by such original recip-
111 ient, determined as of the date of distribution or payment to the
112 surviving spouse in satisfaction of such liability, and (2) any
113 interest or income due under subsection (c). No beneficiary shall
114 be liable to the surviving spouse in an amount greater than the
115 sum of (1) the value of such beneficiary's share of the elective
116 estate at the date of distribution or payment to the surviving
117 spouse in satisfaction of such liability, and (2) any interest or
118 income due under subsection (c).

119 (iv) protection of subsequent transferees. A person other than
120 an original recipient, a beneficiary, or a payor who, whether for
121 value or as a gift, receives an asset included in the elective estate
122 shall be neither obligated under this chapter to return the asset or
123 any portion thereof nor liable under this chapter for the value of
124 the asset or any portion thereof, regardless of whether at the time
125 such asset was received such person had notice of the surviving
126 spouse's intention to file a petition for the elective share or notice
127 that a petition for the elective share had been filed, unless the

128 transfer to such person was a fraudulent transfer as to the sur-
129 viving spouse.

130 (v) nonexistence of liens or encumbrances. The elective share
131 rights of a surviving spouse under this chapter shall not be con-
132 strued as imposing a lien or other encumbrance on any personal
133 property included in the elective estate. Nothing in this chapter
134 shall preclude the court from allowing attachments, trustee
135 process or entering case-specific orders for equitable relief in a
136 proceeding for elective share pursuant to section 7 hereof.

1 SECTION 10. Relinquishment of Right to Elect. (a) The right
2 of election may be relinquished by agreement as to the entire elec-
3 tive estate or a portion thereof. A relinquishment by agreement is
4 valid if all of the following conditions are met:

- 5 (i) the agreement is in writing;
- 6 (ii) the agreement is signed by both spouses;
- 7 (iii) the agreement specifically refers to the right of election;
- 8 (iv) the surviving spouse is provided full disclosure of the dece-
9 dent's assets and liabilities as of the date of execution; and
- 10 (v) the agreement is fair and reasonable as of the date of execu-
11 tion.

12 (b) The right of election may be relinquished as to any partic-
13 ular asset or-assets if all of the following conditions are met:

- 14 (i) the relinquishment is in writing and specifically refers to the
15 right of election under this chapter;
- 16 (ii) the relinquishment identifies the asset or assets to which it
17 pertains with reasonable particularity; and
- 18 (iii) the relinquishment is signed by the surviving spouse and
19 acknowledged before a notary public.

20 (c) The provisions of the foregoing section (b) to the contrary
21 notwithstanding, the signature of the surviving spouse to a written
22 consent to the designation of a beneficiary other than the sur-
23 viving spouse to receive benefits other than a plan intended to be
24 qualified under section 401 of the Internal Revenue Code, or an
25 employee pension plan subject to the provisions of the Employee
26 Retirement Income Security Act of 1974, as amended, provided
27 such consent satisfies the requirements of section of the Internal
28 Revenue Code or section 205 of said Act, as applicable, shall be

29 deemed a valid relinquishment of the right of election as to said
30 benefits.

31 (d) A relinquishment meeting the requirements of this section
32 shall be valid regardless of surviving spouse before or during the
33 marriage.

1 SECTION 11. Protection of Payors. (a) A payor is not liable
2 for having made a payment or transferred an item of property or
3 other benefit included in the decedent's elective estate to a benefi-
4 ciary designated, in a governing instrument, or for having taken
5 any other action in good faith reliance on the validity of a gov-
6 erning instrument, upon request and satisfactory proof of the dece-
7 dent's death, before the surviving spouse, or the surviving
8 spouse's representative has given written notice to the payor, or
9 agent of the payor, by mail or delivery, that (i) the surviving
10 spouse intends to file a petition for an elective share, or (ii) a peti-
11 tion for an elective share has been filed.

12 (b) A payor is liable for payments made or other actions taken
13 after the surviving spouse or the surviving spouse's representative
14 has given written notice to the payor, or agent of the payor, by
15 mail or special delivery, that (i) the surviving spouse intends to
16 file a petition for an elective share, or (ii) a petition for an elective
17 share has been filed.

18 (c) Upon receipt of written notice of intention to file a petition
19 for an elective share or written notice that a petition for an elec-
20 tive share has been filed, a payor may pay any amount owed, or
21 transfer or deposit any item of property held by it, to or with the
22 court having jurisdiction of the probate proceedings relating to the
23 decedent's death, or, if no proceedings have been commenced and
24 said court cannot be identified, to or with the court having juris-
25 diction of probate proceedings relating to decedents' estates
26 located in the county of the decedent's last known address. Pay-
27 ments, transfers, or deposits made to or with the court discharge
28 the payor from all claims for the value of amounts paid to, or
29 items of property transferred to or deposited with the court.

30 d) The probate court shall hold and disburse the funds or item
31 of property deposited with it in accordance with the provisions of
32 this chapter.

1 SECTION 12. Real Estate. (a) Any third party holding an
2 interest in real estate shall have no obligation under section 9 of
3 this chapter nor have any right or obligation based thereon under
4 the following circumstances

5 (1) if, at the time the third party acquired such interest, the
6 interest was not held of record by the decedent, unless the transfer
7 to the third party was a fraudulent transfer as to the surviving
8 spouse; or

9 (2) if there is of record a waiver of the right of election as to
10 such interest that satisfies the requirements of section 10, subsec-
11 tion (b) above; or

12 (3) if the instrument of conveyance by which the third party
13 acquired such interest identifies the decedent as being unmarried
14 at the time of conveyance; or

15 (4) if such interest was conveyed to a third party purchaser for
16 value; or

17 (5) if the third party is a bank, licensed mortgage lender, insur-
18 ance company or other institutional lender and the interest of the
19 third party is that of mortgagee or secured party; or

20 (6) if the third party acquired such interest as a result of fore-
21 closure, deed in lieu of foreclosure, or otherwise as a result of an
22 exercise of rights under a mortgage or other lien; or

23 (7) if there is of record (i) an affidavit by the decedent certi-
24 fying that the real estate in which the decedent transferred an
25 interest was the decedent's residence at the time of the transfer
26 and that the person or persons to whom the decedent transferred
27 such interest were the person to whom the decedent was married
28 at the time of the transfer, and (ii) a physician's affidavit certi-
29 fying that as of a date within ten days of the transfer the person to
30 whom the decedent was married at such date was incapacitated as
31 defined in section 3 of this chapter; or

32 (8) if the third party acquired such interest prior to the enact-
33 ment date of this chapter.

34 (b) Under any of the circumstance s specified above in section
35 12(a) (1-7), and in accordance with section 9(f) of this chapter, (i)
36 the exercise of the elective share right hereunder shall not divest,
37 encumber or have any operation or effect on any interest in real
38 property held by any third party, and (ii) any third party shall hold

39 title to any interest in real property free of the elective share and
40 any right or obligation based thereon.

41 (c) The provisions of this section shall apply to any interest in
42 real property, direct, indirect, choate, inchoate, beneficial, legal or
43 otherwise. An interest in real property is held of record by the
44 decedent within the meaning of this section only if (i) the records
45 of the registry of deeds or land registration district of the Land
46 Court for each of the districts where the real property lies contain
47 a deed or other instrument of conveyance indexed in the chain of
48 title to the real property, vesting title to the interest in the dece-
49 dent, or (ii) if the decedent has acquired and holds title to the
50 interest by testate or intestate succession, as demonstrated by
51 records of the appropriate Registry of Probate which are indexed
52 and available within the chain of title to the real property. In no
53 event shall the interest be deemed to be held of record by a dece-
54 dent solely because the decedent holds title as trustee of any form
55 of trust, including a nominee or realty trust.

56 (d) Any person interested in title to real property shall be enti-
57 tled to rely conclusively and without further investigation upon
58 any written representation of record by the decedent that the dece-
59 dent is unmarried or any written representation of record by a
60 person that such person is the decedent's spouse. A waiver of the
61 right of election as to any specific real property or interest therein
62 (i) shall be deemed to identify such real property or interest with
63 reasonable particularity if it refers to such interest by any form of
64 legal description, by reference to real property described in the
65 same or other instruments or plans of record, by street address or
66 location, by tax assessment references, or in any other manner rea-
67 sonably calculated to identify such real property or interest
68 therein (ii) shall be valid whether recorded, signed, dated, or
69 delivered before, on, or after the date on which the third party
70 acquired such real property or Interest therein; and (iii) shall be
71 valid whether contained in or appended to an instrument of con-
72 veyance or other instrument of record affecting title to such real
73 property or in a separate certificate or other instrument of record.

74 (e) An attorney, settlement agent, or other person representing
75 or otherwise acting on behalf of any third party shall have no duty
76 arising by operation of law by reason of such representation or

77 action, to advise, explain, describe, or make any disclosure con-
78 cerning the legal or financial consequences of executing and/or
79 delivering a waiver prepared pursuant to the requirements of
80 section 10, subsection (b) above.

1 SECTION 13. This act shall take effect upon its passage.